Court of Appeals, State of Michigan

ORDER

Timothy Rumfield v Matthew Henney

Docket No. 260540

LC No. 02-001290-NI

Alton T. Davis
Presiding Judge

David H. Sawyer

Bill Schuette
Judges

The Court orders that the September 26, 2006 dissenting opinion is hereby AMENDED. The opinion contained the following clerical error: footnotes 2 and 3 were not deleted before filing and should have been.

In all other respects, the September 26, 2006 dissenting opinion remains unchanged.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

OCT 0 4 2006
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

TIMOTHY RUMFIELD, Personal Representative of the ESTATE OF DANIEL RUMFIELD, and Conservator/Co-Guardian of JEFFREY RUMFIELD,

Plaintiff-Appellee,

v

MATTHEW HENNEY,

Defendant/Cross-Defendant,

and

BRIAN HENNEY,

Defendant,

and

KELLY FUELS, INC., d/b/a WOODLAND EXPRESS MART,

Defendant/Cross-Plaintiff-Appellant.

UNPUBLISHED
September 26, 2006

No. 260540
Eaton Circuit Court
LC No. 02-001290-NI

Before: Davis, P.J., and Sawyer and Schuette, JJ.

DAVIS, P.J. (*dissenting*).

I respectfully dissent.

This case arises from a particularly horrific collision between two pickup trucks, which killed Daniel Rumfield outright and rendered Jeffrey Rumfield functionally disabled for life. The collision occurred when defendant Matthew Henney drove his truck at anywhere from 70 to

93 miles an hour[1] into the back of the truck being driven by Jeffrey Rumfield. The posted speed limit was 55 miles an hour. The force of the initial impact drove the Rumfield vehicle into a nearby bridge abutment with sufficient force to fold the truck over the railing on its side, eject Jeffrey through a window and into a creek below the bridge, and kill Daniel almost instantly. These events took place after Henney, then a minor at nineteen years of age, purchased a number of beers at defendant Kelly Fuels' convenience store and spent several hours consuming them with the Rumfield brothers and others before the group decided to drive home. The case was tried to a jury for nine days.

The majority concludes that the trial court erred in excluding testimony from two clerks who were not present at defendant's store on the night Henney illegally purchased the alcohol there. I disagree.

The majority first declines to address whether MCL 436.1801(7) requires a seller of alcohol to verify the purchaser's age by demanding official identification on *every* occasion or simply on *an* occasion. As a consequence, the trial court's resolution of the legal issue remains the law applicable to the case. After due consideration, the trial judge ruled in limine that the statute requires identification to be produced and age determined at every sale. Therefore, because we do not find legal error or abuse of discretion in that ruling, for our purposes in resolving the evidentiary issues before us, the statute requires identification to be produced and an alcohol purchaser's age verified anew at *every* sale. Accordingly, it is irrelevant to this transaction whether Henney produced any sort of identification on any other occasion, as the trial court properly ruled.

The majority then concludes that the other clerks' testimony should nevertheless have been admissible for the purposes of refuting Henney's testimony that he never possessed false identification. Presumably, their testimony would simultaneously establish that Henney *could* have shown false identification to the clerk on the night of the accident, further suggesting that Henney's false identification appeared genuine because it convinced two other clerks, and would directly challenge Henney's credibility. The proffered testimony is not relevant or material for these purposes because, after carefully reviewing the record and Henney's testimony, I am unable to find a single instance of Henney denying ever owning false identification.

Henney testified that he never showed Cade, the clerk on the night of the accident, any identification whatsoever. Henney repeatedly testified that he had identification with him *that night*, and he did not have any false identification with him *that night*.[2] He indicated that his wallet contained his driver's license but not a fake driver's license, and he "didn't have any false ID with [him] on that occasion." Henney admitted that he had consumed alcohol on other occasions, but he did not explain how he acquired that other alcohol. In summary, I see nothing

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[1] Although there was some evidence that Henney may have been driving in excess of ninety miles an hour, he consistently maintained that he was traveling at about seventy miles an hour.

[2] [This footnote will be deleted in any final version of this opinion, but for the benefit of the panel, Henney's relevant testimony is at Tr II, pp 124-125, 132-134, 226, 242.]

in Henney's testimony that could be construed as a blanket denial of ever possessing a false identification. Rather, his testimony was that he only had "my real one" in his wallet, but nobody asked to see it. Testimony from the other clerks would therefore have been irrelevant to whether defendant's agent demanded to see Henney's identification at the sale on the night of the accident, and it would not have impeached Henney's credibility or contradicted any of Henney's factual statements. Again, the trial court correctly analyzed and decided the evidentiary issue. I would also note that the trial judge went on to consider an issue that adds further support to the trial court's ruling, which is whether or not the identification purportedly possessed by defendant Henney on occasions weeks before these events was the same as the ID he did possess on the night in question.

Question number 2 on the verdict form asked the jury, "Did Kelly Fuels, Inc's employee demand and was she shown a Michigan driver's license or an official state personal identification card that appeared to be genuine and showed that Matthew Henney was 21 years of age or older?" The jury answered "no." I agree with the majority that this question is unclearly worded. Viewed in isolation, it could indicate that the jury found no demand, no production, no genuineness, or no falsity. However, the record and the evidence clearly show that genuineness was not a viable issue. Henney's testimony was that he did not possess false ID on the night in question and produced no ID of any kind. The clerk's testimony was that she *assumed* she looked at Henney's ID, based on her viewing of the store's security video and a stated personal policy of checking the ID of everyone under the age of forty, because her personal recollection of the evening was vague. She did unequivocally testify that she did not touch Henney's ID in any way, compare the image on his ID to Henney's face, check its expiration date, look for alterations, or confirm the birthdate listed on he ID.

Defendant Kelley Fuels' closing argument was that Henney's testimony that he did not possess false ID was implausible, and that the video tape of the sale showed Cade checking Henney's ID. The video tape of the purchase was shown to the jury several times and speaks for itself. In combination with plaintiff's exhibit 6, a receipt for a credit card purchase of alcohol and cigarettes, it is reasonably obvious that Henney only tendered to the clerk one card-like document, which must have been a credit card. The only other person present was a stocker, who had no facts to add. Henney only contended, in relevant part, that he did not *show* any false identification or indeed any identification at all. The only real factual question for the jury was whether Henney's denial that he *showed* identification should be believed. When viewed in the context of the evidence and testimony actually presented, the jury's answer to verdict form question two must mean it found Henney did not show Cade a false ID of any sort.

I agree with the majority's reasoning and conclusion that the trial court did not err in refusing to instruct the jury on comparative negligence stemming from a passenger's decision to ride with an intoxicated driver.

I also agree with the majority's reasoning and conclusion that the trial court did err in instructing the jury that failing to wear a seat belt was subject to a five-percent limitation when calculating comparative negligence. However, the majority does not address whether defendant suffered any prejudice as a result of this error. Whether an error occurred is an independent analysis from whether the error was harmless. *Ward v Consolidated Rail Corp*, 472 Mich 77, 86; 693 NW2d 366 (2005).

The effect of the trial court's instruction is that the jury was permitted to find plaintiff Jeffrey Rumfield did not wear a seat belt, and, if it so found, it was permitted to assign no more than 5% fault to Rumfield for failing to do so. Nothing on the jury verdict form indicates whether the jury found that Rumfield was not wearing a seat belt. However, question thirteen shows that the jury assigned a total of 20% fault to Rumfield. The testimony tending to suggest that Rumfield was not wearing his seat belt was at best ambiguous. In contrast, there was less ambiguous testimony, and more extensive argument, indicating that Rumfield had consumed at least as much alcohol as Henney and, more significantly, that Rumfield had turned off the lights on his vehicle, possibly making the accident unavoidable no matter how fast Henney had been driving or how intoxicated he had been. In light of the testimony and the 20% apportionment of fault, I am simply not convinced that it would be "inconsistent with substantial justice," MCR 2.613(A), to leave the jury's verdict undisturbed. I also cannot uncover anything in the lower court record suggesting that the verdict is against the great weight of the evidence. *Wischmeyer v Schanz*, 449 Mich 469, 485; 536 NW2d 760 (1995).

It has long been a cornerstone of our jurisprudence that "[w]e are bound in all cases to assume that the jury have done no legal wrong when acting within their province." *Elliott v Van Buren*, 33 Mich 49, 52 (1875). "The rule is that the verdict must stand unless it clearly appears that the jury must have been influenced by passion, prejudice, partiality, corruption, or mistake as to the law or facts." *Lee v McCormick*, 279 Mich 120, 122-123; 271 NW 579 (1937) (internal quotation omitted). Notwithstanding the erroneous instruction, the record suggests none of these elements. Generally, verdicts "will not be disturbed so long as it is within the fair range of the testimony." *Merkur Steel Supply Inc v City of Detroit*, 261 Mich App 116, 137-138; 680 NW2d 485 (2004) (internal quotation omitted). I would continue our legal system's traditional respect for the sanctity of jury verdicts.

Given my view of this case, I find it necessary to address two issues the majority does not. First, defendant argues that the trial court should have granted a new trial because one of the jurors turned out to be a licensed attorney, a fact not discovered until after trial. The juror did not withhold his occupation deliberately. In fact, the juror apparently filled out his questionnaire accurately, but the information was omitted from the copies provided to the trial court and counsel because of an administrative or clerical error. There is no hint of any misconduct by anyone below. No party's counsel thought to ask the juror on voir dire whether he held a juris doctor degree, but voir dire was not limited by the trial court, and it revealed nothing otherwise objectionable. None of the omitted or undisclosed information would be grounds for dismissal for cause. Defendant does not provide any indication of how the juror's license to practice law affected the outcome of the case, other than stating the obvious about *any* juror: we will never know for certain. More significantly, there is no hint that the juror's educational background caused defendant any actual prejudice. No new trial on this basis is warranted.

Finally, defendant argues that the trial court abused its discretion when it granted plaintiff case evaluation sanctions of $393,639. This Court reviews de novo a trial court's decision whether to award case evaluation sanctions, but this Court reviews the amount of sanctions awarded for an abuse of discretion. *Campbell v Sullins*, 257 Mich App 179, 197; 667 NW2d 887 (2003). Defendant does not appear to challenge the trial court's decision to award sanctions in the abstract. Rather, defendant only argues that the amount of sanctions was an abuse of discretion because it included fees incurred by collaborating attorneys conducting duplicative

work, and because it is in any event unreasonably high, especially given that a similar award would have been essentially uncollectible against plaintiff had defendants prevailed. Defendant does not suggest to this Court which specific portions of the award were wrongful or what a proper award would have been, but rather urges this Court to "say, simply, "Too much" and remand to the trial court," apparently with no further guidance.

However, defendant has not supported its implied assertion that the multiple attorneys performed only the work of a single attorney, and there is no inherent legal prohibition against such billing. *Attard v Citizens Ins Co of America*, 237 Mich App 311, 329; 602 NW2d 633 (1999). Defendant also has not shown any indication that any billed item did not occur. Indeed, defendant explicitly declined the trial court's offer to go over each item individually. Otherwise, defendant essentially reiterates its core argument from below: that the individual items billed are reasonable, but the aggregate bill is not.[3] This seems like an argument that two plus two should equal three. I cannot imagine how the trial court abused its discretion, especially in a case as lengthy and complicated as this one, by concluding that two plus two equaled four. Defendant also reiterates its "mutuality of risk" policy argument, but presents no legal support for it other than a bare statement that defendant "believes it should be part of the equation." This Court will not undertake to support a party's position for it. *Wysocki v Kivi*, 248 Mich App 346, 360; 639 NW2d 572 (2001).

I would affirm.

/s/ Alton T. Davis

[3] [This footnote will be deleted in any final version of this opinion, but for the benefit of the panel, defendant's counsel stated: "And if, if you look at it in isolation it is, it's reasonable. But if you look at it in a gross manner it's not reasonable is my argument." See page 25 of the 10/21/04 motions transcript.]